

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

B

P/S

Docket
No. 75-7237

IN THE
United States Court of Appeals
For the Second Circuit

EUGENIA E. CARVER,

Plaintiff,

—vs—

CARL F. GUY,

Defendant and Third-Party Plaintiff, Appellant,

—vs—

CHRISTOPHER S. CARVER,

Third-Party Defendant, Respondent.

On Appeal from the United States District Court
Northern District of New York

RESPONDENT'S BRIEF

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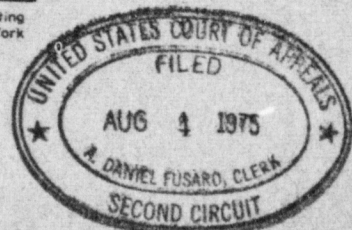




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RESPONDENT'S BRIEF

**STATEMENT OF ISSUE PRESENTED
FOR REVIEW:**

Whether the Federal District Court's Order granting summary judgment and thereby dismissing Appellant's Third Party Complaint was proper.

STATEMENT OF THE CASE

On or about November 5, 1971, the plaintiff — Eugenia E. Carver, the appellant — Carl F. Guy, and the respondent — Christopher S. Carver, were parties to an agreement that was to be used to attempt to effectuate a transfer of certain trust funds to the respondent as designee nominee then to the appellant as escrow agent.

After Surrogate proceedings in New York County, New York, a judgment was entered whereby manufacturer Hanover Trust Company as trustee was directed to pay respondent the corpus of the trust formerly administered by Manufacturer Hanover Trust Company. Said bank transferred the money and corporate securities to the respondent and in accordance with the terms of the escrow agreement heretofore mentioned the respondent transferred to the appellant as escrow agent, the corporate securities and proceeds of the trust which were valued in December of 1973 at Eight Hundred Thousand Dollars (\$800,000.00). By the terms of the escrow agreement, the plaintiff authorized the appellant to keep and preserve the property in his possession until such time as the plaintiff requests the same to be delivered either to her or to be paid out and invested in accordance with the plaintiff's instructions in other or different forms of security or property. After the receipt of the property in December of 1973, the plaintiff directed the appellant to transfer the funds to the respondent. The appellant did so transfer said corporate securities and funds but prior to that transfer withdrew from the depository that was holding the funds, the amount of Forty Thousand Thirty-Eight Dollars and Eighty-Seven Cents (\$40,038.87) for his own use.

The plaintiff commenced an action in conversion and unauthorized dispersal of funds under the escrow agreement. The agreement was drafted by the appellant as attorney for the plaintiff and the respondent was a party to said escrow agreement. The agreement contains the following language:

The donor (plaintiff) and nominee (respondent) do hereby release the escrow agent (appellant) from, and agree to indemnify him, against any liability whatsoever arising out of this agreement.

Based upon this clause, the appellant commenced a third party action against the respondent for indemnification if he shall be held liable for converting and unlawfully disbursing the funds of the plaintiff. The respondent brought a motion to dismiss the third party complaint of the appellant or in the alternative for summary judgment dismissing said claim.

DECISION OF THE LOWER COURT.

The Court made no written decision but issued an order granting summary judgment to the respondent dismissing compellant's third party complaint.

POINT I

APPELLANT'S INTERPRETATION OF THE INDEMNIFICATION CLAUSE IS VOID AS AGAINST PUBLIC POLICY.

It is a general rule that a contract to indemnify against the consequences of an illegal or immoral act is void and will not be enforced (*Armstrong v. Toler*, 11 Wheat. (U.S.) 258; *Kansas City Operating Corp. v. Durwood* (CA8), 278 F.2d 354; 41 Am. Jur. 2d Indemnity §11).

Furthermore, the proposed construction of the indemnification clause by the appellant directly effects the duties and obligations, which as a matter of law, arise out of the relationship existing between the parties. Appellant's construction protects him from acts that are in violation of the trust created in him as escrow agent by the agreement sought to be enforced by the plaintiff (*Riley v. Porcher*, 46 App. Div. 290).

Conversion or unauthorized dispersal of property owned by another is an euphemism for conduct potentially criminal in nature. The causes of action on which plaintiff relies are for illegal acts and violations of trust as agent for the plaintiff. An agreement to indemnify for such conduct and for violations of a trust created by plaintiff and respondent is void as against public policy.

POINT II

THE CONSTRUCTION PROPOSED BY THE APPELLANT OF THE AGREEMENT IS INCREDIBLE AS A MATTER OF LAW AND, AS SUCH, SUMMARY JUDGMENT WAS PROPERLY GRANTED.

The construction of a written release and indemnification clause is for the Court to decide (*Barnes v. American China Development Company*, 131 App. Div. 40). An indemnity clause must reflect the unmistakable intent of the parties as to the scope of its coverage (*Redding v. Gulf Oil Corporation*, 38 A.D.2d 850). The instrument should be construed according to the object of the instrument and its purpose and where the intention of the parties is ascertainable, it should be used (*Murphy v. New York*, 190 N.Y. 413). Furthermore, it is the law of the State of New York that such a clause should be constructed more strongly against the draftsmen or the party causing the instrument to be drafted (*Jersey Ins. Co. of New York v. Parrish*, 33 N.Y.S.2d 440; *Meyers v. Fredrick Hussey Realty Corp.*, 45 N.Y.S.2d 137, aff'd 267, App. Div. 951).

The agreement on which the plaintiff sues is an escrow agreement drawn by her attorney with the attorney as escrow agent. The purpose of the agreement was to transfer funds from a trust through her son, the respondent, to the appellant to hold as agent for plaintiff. The appellant then took some of that money in violation of the escrow agreement, ostensibly, as attorneys fees. Now he seeks indemnification under that very agreement from the nominee in that agreement for acts that the plaintiff labels as conversion.

Furthermore, in appellant's verified answer to the plaintiff's complaint, he claims that the same escrow agreement relieves him from any liability for conversion, even it can be assumed if appellant wrongfully appropriated the whole of the escrowed property. Such a construction of words is incredible as a matter of law or as stated elsewhere "[Appellant's] contention is clearly untenable, if not reprehensible" (*Gross v. Federal Reserve Bank of Cleveland*, 29 F. Supp. 1005, 1006 (S.D. Ohio 1939)).

POINT III

EVEN IF SUCH CLAUSE IS CONSTRUED IN THE MANNER, APPELLANT WOULD CONSTRUE IT, RESPONDENT COULD IN NO WAY BE LIABLE TO THE APPELLANT.

Aside from the merits of the release and indemnification clause, conceding for argument appellant's interpretation, respondent cannot be liable over because appellant also interprets said clause to relieve him from liability to the plaintiff.

In appellant's verified answer and counter-claim, he alleges that the plaintiff expressly released appellant from liability. Both plaintiff and respondent are parties to the contract with appellant and if the release and indemnification clause protects him from liability then he needs no indemnification from respondent. There is no reasonable or possible construction of the clause by which the appellant could be liable to the plaintiff in conversion or unauthorized dispersal of plaintiff's property and still have an action over for indemnification.

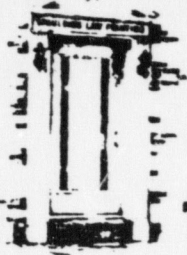
If on the other hand appellant is found liable to plaintiff, the Court must dismiss appellant's affirmative defense and thus construe the clause not shielding appellant's conduct and dismissing his claims for indemnification.

CONCLUSION

RESPONDENT RESPECTFULLY REQUESTS THAT THE ORDER OF THE DISTRICT COURT GRANTING SUMMARY JUDGMENT BE AFFIRMED.

Respectfully submitted,

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RUSSELL D. MAY, owner

LETTER OF TRANSMITTAL

Date: August 1, 1975

Hon. A. Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
Room 1702 U.S. Court House
Foley Square
New York, N. Y. 10007

Re: Eugenia E. Carver v. Carl F. Guy v. Christopher S. Carver
Docket
~~Index~~ No. 75-7237

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

[--] Records

[25] Briefs

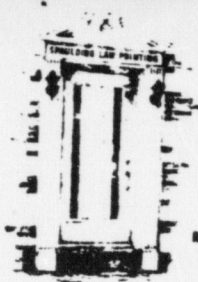
~~[--] Original Record enclosed--~~

~~[--] Original Record to come~~

Very truly yours,

Everett J. Rea

cc: Costello, Cooney & Fearon



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RUSSELL D. HAY, owner

AFFIDAVIT OF SERVICE

RE: EUGENIA E. CARVER v. CARL F. GUY v. CHRISTOPHER S. CARVER

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of COSTELLO, COONEY & FEARON, Attorneys for Respondent, Christopher S. Carver,

he personally served ^{two (2)} ~~three (3)~~ copies of the printed [Record] [Brief] ~~appendix~~ of the above-entitled case addressed to:

CARL F. GUY, ESQ.
Attorney at Law
1643 W. Genesee St.
Syracuse, N. Y. 13204

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on August 1, 1975.

Sworn to before me this 1st
day of August , 1975.

Everett J. Rea

Russell D. Hay
Commissioner of Deeds

cc: Costello, Cooney & Fearon